

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Request to Update Default Compensation Rate	)	WC Docket No. 03-225
For Dial-Around Calls from Payphones	)	
	)	

**REPLY OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL TO  
COMMENTS ON THE PETITION FOR RECONSIDERATION OF THE  
INTERNATIONAL PREPAID COMMUNICATIONS ASSOCIATION**

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The American Public Communications Council ("APCC") hereby replies to comments on the International Prepaid Communications Association's ("IPCA's") petition for reconsideration ("IPCA Petition") of the Commission's Report and Order in this proceeding, FCC 04-182, released August 12, 2004 ("*Order*"). In the *Order*, the Commission increased the rate of compensation received by payphone service providers ("PSPs") for dial-around calls originating from their payphones from \$.24 to \$.494 per call. Cost studies submitted in this proceeding two years ago showed that even then, PSPs were unable to recover their costs, were compelled to remove payphones at an accelerating rate, and required an immediate rate increase to prevent further unacceptable declines in payphone deployment. Two years later, PSPs finally obtained a rate increase, but they will not receive any significant compensation under the new rate until April 1, 2005.<sup>1</sup> Without providing a shred of supporting evidence,

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<sup>1</sup> The *Order* was published in the Federal Register on August 26, 2004, with an effective date of September 27, 2004. 69 Fed. Reg. 52444 (Aug. 26, 2004). Compensation is billed on a quarterly basis, with payments made three months after the close of a calendar quarter. Thus, the earliest payments at the new rate will be made January 1, 2005, but they will only cover the last four days of the third quarter of 2004 (September 27-30, 2004). The first significant payments at the new rate will cover the fourth quarter of 2004 and will not be received by PSPs until April 1, 2005.

IPCA now requests that the Commission further delay implementation of the \$.494 rate. The comments confirm that the Commission must deny this request.

## DISCUSSION

### I. THE COMMENTS CONFIRM THAT THERE IS NO REASON TO DELAY THE EFFECTIVE DATE OF THE REVISED COMPENSATION RATE

For all the reasons stated in APCC's opposition to IPCA's request for stay<sup>2</sup> and the RBOC Payphone Coalition's opposition to IPCA's petition for reconsideration,<sup>3</sup> the Commission should deny IPCA's petition.

#### A. Prepaid Card Providers Have Had Ample Time To Prepare For The New Rate

As APCC explained in its *Immediate Implementation Ex Parte*,<sup>4</sup> prepaid card providers have had ample time to prepare for the implementation of a new rate. APCC Stay Opp. at 3-4; RBOC Opp. at 3. More than two years ago, the PSPs initiated this proceeding by filing petitions proposing essentially the same rate increase that the Commission has now ordered. *Order*, ¶ 14. At that time, the PSPs submitted detailed cost studies supporting the proposed rate. *Id.*, ¶ 26 & n.77. Thus, the prepaid card industry has been aware for more than two years that a rate increase was likely. Moreover, IPCA itself raised the issue of increasing the payphone surcharge in its

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<sup>2</sup> Opposition of the American Public Communications Council to the Request for Stay of the International Prepaid Card Association, filed October 12, 2004 ("APCC Stay Opp.").

<sup>3</sup> RBOC Payphone Coalition's Opposition to Petition for Reconsideration, filed October 27, 2004 ("RBOC Opp.").

<sup>4</sup> Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, June 28, 2004, at 2 ("*Immediate Implementation Ex Parte*").

comments filed in this proceeding ten months ago. *See* Comments of IPCA, filed December 2, 2003.

Once the Commission provided public notice of the proposed rate increase, prepaid card providers could and should have begun taking steps to the extent necessary to prepare for a rate increase. At any time in the last two years, prepaid card providers could have increased payphone surcharges to the extent necessary to recover anticipated costs.<sup>5</sup> Alternatively, they could have ensured that their cards had expiration dates so that cards issued prior to Commission action on the proposed rate increase would expire before the rate increase became effective – or at least before significant compensation payments would have to be made at an increased rate.<sup>6</sup> Further, providers could have approached state public service commissions to ensure that any existing rate caps would not interfere with their ability to recover the proposed rate increase.

If the prepaid card industry failed to take such reasonable measures to prepare for a rate increase, they should not be heard to request what is in effect a stay of the new rate. *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (to justify a stay, alleged harm must result *directly* from the action to be stayed).

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<sup>5</sup> In fact, currently issued cards commonly carry surcharges of \$.65 - \$.80, or roughly three times the old \$.24 compensation rate. *Immediate Implementation Ex Parte* at 2-3. It seems dubious in the extreme that such excess charges do not more than fully cover the present costs associated with the \$.24 compensation rate. Even if such existing surcharges are not sufficient to recover fully the costs under the new rate, they appear to provide an ample “cushion” of revenue to enable card providers to weather any transitional period that might be required prior to a further increase in the surcharge.

<sup>6</sup> Pre-paid providers have also been fully familiar with the dial-around compensation process and the lead times necessary for cards to be timely.

Furthermore, the prepaid industry has the ability to protect itself even now. APCC Stay Opp. at 4-5; RBOC Opp. at 4. IPCA does not dispute that neither the FCC nor the vast majority of state public service commissions impose any limits on payphone surcharges assessed on prepaid card users.<sup>7</sup> IPCA also does not dispute that, as documented in APCC's *Supplemental Immediate Implementation Ex Parte*,<sup>8</sup> prepaid cards and advertisements almost uniformly state that "[r]ates and service charges are subject to change without prior notice." *Id.* at 3. Therefore, IPCA's members can immediately raise the payphone surcharge applicable to most calls made on existing cards.

Moreover, even if rate increases could not be made effective with respect to existing cards, the industry has ample time to bring new cards into circulation by the time they will begin making substantially increased payments under the new rate, six months after the filing of IPCA's petition. As noted above, the first significant compensation payments at the new rate will not come due until April 1, 2005. The additional cash flow gained by the industry from increased surcharges (or other rates) between the date of the *Order* and April 1, 2005 should easily suffice to prevent any serious economic harm.

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<sup>7</sup> According to IPCA, there are only "approximately seven states" that cap the payphone surcharge. IPCA Petition at 3. Moreover, those caps only apply, if at all, to intrastate calls within one of those seven states. See discussion below and note re MCI comments.

<sup>8</sup> Supplemental Ex Parte re Immediate Implementation of Revised Compensation Rate, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, June 28, 2004, at 2 ("*Supplemental Immediate Implementation Ex Parte*"). With this ex parte, APCC filed 18 exhibits showing prepaid cards and advertisements for prepaid cards using the "without prior notice" language.

**B. There Is No Basis For IPCA's Concerns About Consumer Confusion Or Deception**

IPCA also fails to substantiate its claims that a rate increase would cause consumer confusion or charges of deceptive practices. APCC Stay Opp. at 5-6; RBOC Opp. at 4. And as IPCA itself points out, its members can alleviate any such harm by providing voice prompts that notify consumers of the increased rate and by posting revised rate information at the point of sale. IPCA Petition at 4, 6. Although IPCA complains of the costs that members would incur in taking these steps, IPCA does not deny that they can be taken or that the industry is able to recover such one-time costs over a reasonable period.

IPCA also contends that, even though prepaid cards uniformly warn consumers that rates can be increased without notice, and even though card issuers could use voice-prompts to notify consumers of the rate change, "some" regulatory agencies could view a precipitous rate change as "possibly" in violation of rate disclosure requirements and "possibly" a deceptive trade practice. IPCA Petition at 6. IPCA provides no factual support to establish that such a reaction by regulators is at all likely. *Wisconsin Gas v. FERC*, 758 F.2d at 674 (mere possibilities cannot justify a stay). Charges of nondisclosure or deception, moreover, could apply only to cards that were purchased before the surcharge was increased. As admitted by IPCA (IPCA Petition at 4), however, and as detailed in APCC's *Supplemental Immediate Implementation Ex Parte* (at 3 n.3), many cards have expiration dates, frequently expiring within 90 days of first use. Given the long-pending rate increase proposals and the patently obvious risk that they would be granted, reasonably cautious card issuers should have already protected themselves by adding expiration dates to their cards.

**C. State Rate Caps Could Not Possibly Affect More Than A Fraction Of Industry Revenues**

IPCA also claims that the precautions discussed above would not be feasible in all cases, because “[a]pproximately seven states cap the DAC charge permissible on prepaid phonecards, and that cap is \$.24 per call.” IPCA Petition at 3. IPCA does not, however, identify the states, describe the nature of the caps (*e.g.*, whether they are “soft” or “hard” caps), or estimate the percentage of prepaid calls and revenues that are affected by the caps. Furthermore, even if supported, rate caps imposed by seven states could not affect more than a small fraction of total industry revenues. States have no jurisdiction to regulate caps on interstate rates or on the high-priced international calls that reportedly comprise a large share of prepaid industry revenues. APCC Stay Opp. at 7.

Moreover, as noted above, IPCA members could and should have approached the public service commissions in the affected states if necessary to obtain temporary relief from any caps.

**D. AT&T’s Comments Add Nothing Of Substance And Highlight The Lack Of Any Factual Support For IPCA’s Petition**

AT&T’s comments in support of the IPCA petition add nothing of substance.<sup>9</sup> Indeed, AT&T’s support for the IPCA petition is not based on any factual claims, but merely on AT&T’s “belie[f] that industry and consumers would be better served by a

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<sup>9</sup> Comments of AT&T on Petition for Reconsideration, filed October 27, 2004 (“AT&T Comments”). MCI also filed comments on IPCA’s petition, but did not support the petition. MCI merely argues, and requests a Commission ruling, that payphone surcharges used to recover federal payphone compensation should be considered interstate charges, subject to review only by the Commission. Comments of MCI on Petition for Reconsideration and Request for Clarification Regarding Jurisdiction of Payphone Compensation Surcharges, filed October 27, 2004. APCC takes no position on this argument at this time; however, the ruling requested by MCI is tangential to the matters raised by IPCA. If the Commission chooses to address MCI’s request, it should issue a public notice and establish a comment cycle.



longer transition time.” AT&T Comments at 3. AT&T’s inability to provide even a fig leaf of factual support for IPCA’s petition underlines the lack of any valid basis for the Commission to defer the effective date beyond the normal period.<sup>10</sup> As discussed above, APCC submitted a mass of evidence showing that prepaid card providers had – and still have – ample opportunity to prepare for the new compensation rate. By contrast, IPCA and its allies have provided virtually no evidence to support their contrary claim.

Moreover, while AT&T complains that in providing for the normal 30-day effective date the Commission did not heed last-minute ex parte requests by carriers to *defer* the effective date, the evidence in the record was far stronger in favor of APCC’s request for an *accelerated* effective date.<sup>11</sup> As APCC noted at the time, there was ample and compelling record evidence that the existing \$.24 rate was far below the level necessary to recover marginal payphone costs and was thus forcing payphone service providers to remove payphones unnecessarily every month that it remained in effect.

As the record in this proceeding makes clear, neither phone cards nor coins can be used to make calls if there is no available phone at which to make the calls. The compensation rate increase ordered by the Commission is ultimately grounded in the undisputed fact that, while the payphone industry has been waiting for a rate increase, the installed base of payphones has declined alarmingly, and continues to do so. To stem that decline, the industry must receive the infusion of revenue that the \$.49 rate

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<sup>10</sup> It is especially disingenuous for AT&T to make these unsupported arguments because, as APCC showed, AT&T’s own cards expressly reserve the right for AT&T to raise its rates. *Immediate Implementation Ex Parte* at 3.

<sup>11</sup> *Immediate Implementation Ex Parte* at 2. *Supplemental Immediate Implementation Ex Parte* at 3-4. The Commission must, of course, base its decision on the record before it. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 US 29, 46-57 (1983).

will bring as quickly as possible. The Commission correctly found that the rate increase benefits the public, including low-income customers, the elderly, and residents of rural areas, by encouraging payphone deployment and discouraging payphone removal. APCC Stay Opp. at 8; RBOC Opp. at 6. Further delaying a compensation rate increase that has been needed for at least two years will cause far more harm than benefit to the payphone-using public, and the harm to the public and to PSPs from delaying the increase far outweighs any harm to prepaid card providers from its immediate implementation.

In short, there is copious record evidence supporting an *accelerated* effective date for the \$.494 and no real evidence supporting any further delay in the effective date. Any minor harm that might occur to the prepaid card industry is far outweighed by the harm to payphone service providers and their customers from further delaying a rate increase that has been delayed for two years and that is badly needed to avoid removal of payphones. APCC Stay Opp. at 8.

## **II. IPCA'S REGULATORY FLEXIBILITY ACT CLAIM HAS NO MERIT**

To the extent that IPCA requests reconsideration of the rate increase itself (as opposed to its timing), IPCA presents no material facts or arguments that have not already been considered. RBOC Opp. at 6-7. IPCA's claim of error in the Commission's Regulatory Flexibility Act analysis is not only incorrect (RBOC Opp. at 5) but irrelevant, as it made no difference to the Commission's conclusions (*id.*; APCC Stay Opp. at 2-3 n.1). The Commission's regulatory flexibility analysis is not subject to judicial review (5 U.S.C. § 611), and IPCA has not shown that the Commission's determination in that

analysis of the number of prepaid service providers affected in any manner its final decision. *Thompson v. Clark*, 741 F.3d 401 (D.C. Cir. 1984).

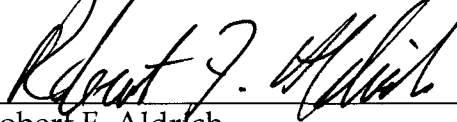
## CONCLUSION

For the foregoing reasons, the Commission should deny IPCA's petition for reconsideration.

Dated: November 8, 2004

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2004, the foregoing Reply of the American Public Communications Council to Comments on the Petition for Reconsideration of the International Prepaid Communications Association was delivered via first-class U.S. Mail, postage pre-paid to the following:

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